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No. 03-221

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IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison - Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Cheryl K. Pliler, Warden of California State Prison – Sacramento, at Represa, California (hereafter the Warden), respectfully submits this reply to respondent Richard Herman Ford's opposition to the petition for writ of certiorari (referred to hereafter as the Opposition). In her petition, the Warden seeks review on two questions: (1) whether the dismissal of a "mixed" habeas petition is improper unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies and advises the petitioner with respect to the statute of limitations in the event of any refiling; and (2) whether a second, untimely habeas petition may "relate back" to a first habeas petition, where the first habeas petition was dismissed and the first proceeding is no longer pending.

A. Consistency and Conflict Between the Circuits

This Court has unequivocally and repeatedly held that "a district court *must* dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1981) (emphasis added); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982). It is undisputed that the two federal petitions submitted

by Ford for filing on April 19, 1997 (collectively referred to hereafter as the First Petitions) were unexhausted. As the dissent in this case observes:

> Ford filed . . . improper mixed [first] petitions. The district court correctly offered him the option of either amending the petition[s] by deleting the unexhausted claims and proceeding with only those that had been exhausted, or suffering the dismissal of his entire petition[s] without prejudice. This is exactly what a district court is supposed to do. *James v. Pliler*, 269 F.3d 1124, 1125-26 (9th Cir. 2001). When Ford did not express a choice, the district court again did exactly what it was supposed to do: It dismissed Ford's mixed [first] petition[s] without prejudice. *Rose v. Lundy*, 455 U.S. [at 510]; *James v. Pliler*, 269 F.3d at 1125.

App. A40 (Silverman, J., dissenting).

Ford nevertheless maintains in his Opposition that the "rights advisements adopted by the majority are consistent with the responsibilities that attend a federal court's assumption of jurisdiction over a habeas petition filed by a pro se prisoner litigant." Opp'n at 10. Not so. *No* court (other than *Ford*) has *ever* held that a mixed habeas petition may *not* be dismissed under *Rose v. Lundy*, unless the district court informs the petitioner about the possibility of a stay of the proceeding pending exhaustion of state remedies, and advises the petitioner that if the court dismisses the petition the one-year limitation period of the Antiterrorism and Effective Death Penalty Act of 1996 (referred to hereafter as the AEDPA) may bar any future federal claims. *See* App. A42-43 (Silverman, J., dissenting) ("Boldly going where no court has gone before . . . .").

The majority in effect *requires* district courts to entertain mixed habeas petitions where the newly-announced advisements were not provided; dismissal under such circumstances, according to the majority, constitutes "prejudicial error." App. A15. As set forth in the Warden's

petition, the majority's holding in that regard conflicts with the decisions of at least three other circuit courts of appeals. *See, e.g.*, *Warren v. Garvin*, 219 F.3d 111, 114-15 (2d Cir. 2000) ("[A]ppellant knew of the 1-year limitations period for habeas petitions under the AEDPA, and his failure to timely refile (or to pursue his additional state claims) is merely garden variety neglect"); *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996) ("We conclude that any suggestion in our prior cases that a district court has broad discretion to hold in abeyance a habeas petition including both exhausted and unexhausted claims pending exhaustion of state remedies is contrary to the Supreme Court's explicit directions in *Rose v. Lundy*"); *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995) ("The district court must also dismiss a mixed petition, such as Sterling's petition, containing both exhausted and unexhausted claims").

Most recently, in *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003), the Eighth Circuit addressed a habeas petitioner's claim that the district court should have stayed his mixed petition while he exhausted his newly-presented claims, in part because the AEDPA's one-year period of limitation had lapsed while his petition was pending in federal court. *Id.* at 685. As the court noted in reviewing the claim, "absent a stay or equitable tolling, Akins will be unable to return to federal court following exhaustion of his state court remedies." *Ibid.* The court nevertheless rejected the petitioner's contention, and held:

> Several circuits have concluded that a stay is required or is reasonable in cases of mixed habeas petitions where a dismissal would "jeopardize the petitioner's ability to obtain federal review" in light of AEDPA's one-year statute of limitation. *Nowaczyk* [*v. Warden, New Hampshire State Prison*], 299 F.3d [69,] . . . 79 [(1st Cir. 2002)]; *see also Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir. 2003); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Zarvela v. Artuz*, 254 F.3d 374, 380 (2d Cir. 2001), *cert. denied*, 534 U.S. 1015 . . . (2001); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000),

cert. denied, 531 U.S. 946 (2000).[1/] Justice Stevens stated in his concurring opinion in *Duncan* [*v. Walker*, 533 U.S. 167] that "although the Court's pre-AEDPA decision in *Rose v. Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." *Duncan*, 533 U.S. at 182-83 . . . (Stevens, J., concurring in part and concurring in the judgment) (citation omitted).

While this view may be the "growing consensus," *Nowaczyk*, 299 F.3d at 79, it has not yet been adopted by a majority of the members of the Supreme Court or by this circuit. Absent contrary controlling Supreme Court authority, we are bound to follow our own precedents and the Supreme Court's view as expressed in *Rose v. Lundy*. We have held, post-AEDPA, that "a district court has no authority to hold a habeas petition containing unexhausted claims in abeyance absent truly exceptional circumstances, such as when state remedies are inadequate or fail to afford a full and fair adjudication of federal claims, or when exhaustion in state court would be futile." *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (citing *Victor v. Hopkins*, 90 F.3d [at 279-80 & n.2, 282 . . .]). Habeas petitioners who delay filing for state postconviction relief "should be held

1. It should be noted that, of the cases cited by the *Akins* court regarding stays pending exhaustion, *Nowaczyk* involved the stay of a *fully-exhausted* petition, 299 F.3d at 80, *Palmer* upheld the dismissal of a *second*, untimely petition, 276 F.3d at 781-82, *Zarvela* required the *dismissal* of unexhausted claims prior to the grant of any stay, 254 F.3d at 380-82, and *Freeman* noted that "a prisoner who wants to pursue state relief while assuring an entitlement to federal relief can protect himself by filing in *both* courts." 208 F.3d at 577 (emphasis added). Only *Brambles* (itself a Ninth Circuit case) relied upon the principles announced by the majority in *Ford*.

> responsible for their failure to fulfill the long-standing requirement that they exhaust state remedies." *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). Akins has asserted unexhausted claims and there is no showing that it would be futile for him to pursue his available state court remedy, which he would have been wise to pursue in the first instance. We cannot conclude that the district court abused its discretion in not granting a stay *sua sponte*. *See Thompson v. Sec. for Dep't of Corr.*, 320 F.3d 1228, 1229-30 & n.3 (11th Cir. 2003) (holding district court did not abuse its discretion by dismissing mixed petition in spite of petitioner's argument that he had no choice but to file a mixed petition in order to meet the one-year filing deadline of AEDPA and preserve federal review for the exhausted claims).

Id. at 685-86.

As in *Akins*, the one-year limitation period lapsed while Ford pursued his unexhausted claims in district court. Courts, however, "are bound to follow . . . the Supreme Court's view [requiring dismissal of mixed petitions] as expressed in *Rose v. Lundy*." 341 F.3d at 686. Accordingly, the majority's "concoct[ion]," App. A41 (Silverman, J., dissenting), is in direct conflict with the holdings of this Court and at least three other circuit courts of appeals.

B. "Stay and Abeyance" and "Comity"

Despite Ford's contention that "[n]othing in the procedure approved by the court 'circumvents the AEDPA's limitations period,'" Opp'n at 15, the majority, by its holding, has institutionalized a procedure that promotes the amendment of stayed petitions with newly-exhausted (but time-barred) claims. Thus, despite this Court's insistence that only the timely filing of a claim in *state court* may toll the AEDPA's limitation period, *see Duncan v. Walker*, 533 U.S. at 179-80, the majority

holds that the timely filing of a habeas petition in *federal court* may accomplish the same goal. *See* App. A15.

The majority's holding also encourages piecemeal litigation. In *Rose v. Lundy*, this Court observed that "strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition." 455 U.S. at 520. Similarly, the purpose of the AEDPA is to encourage habeas petitioners to file *timely* and *fully exhausted* single habeas petitions. *See Duncan v. Walker*, 533 U.S. at 179-80. The majority's holding, in contrast, encourages the filing of "mixed" habeas petitions and the consideration of time-barred claims. Nothing Ford has cited suggests otherwise.

C. Rule of Civil Procedure 15(c) and "Relation Back"

Ford relies upon two decisions - *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999) and *In re Gasery*, 116 F.3d 1051 (5th Cir. 1997) (*per curiam*) - for the proposition that "other circuits have held that a habeas application filed after a previous application was dismissed for non-exhaustion is a 'continuation' of the earlier application." Opp'n at 38. Neither case, however, supports Ford's proposition. In *Graham v. Johnson*, the Fifth Circuit actually *rejected* the contention that a second habeas petition may be deemed to "relate back" to an original petition that was dismissed without prejudice. In doing so, the court stated: "Construing an application filed after a previous application is dismissed without prejudice as a continuation of the first application for all purposes would eviscerate the AEDPA limitations period and thwart one of AEDPA's principal purposes." 168 F.3d at 780.

In re Gasery, on the other hand, involved the same court's consideration of a "*second or successive*" petition within the meaning of Rule 9(b) of the Rules Governing Section 2254 Cases. *See* 116 F.3d at 1051-52. In concluding that a petition refiled after dismissal was not successive, the Fifth Circuit held:

> We . . . conclude that Gasery's refiled petition is merely a continuation of his first collateral attack, not a "second or successive" within the meaning of § 2244(b). *See Benton* [*v. Washington*], 106 F.3d [162] . . . 164 [(7th Cir. 1996)] ("The sequence of filing, dismissal, exhaustion in state court, and refiling . . . might generate multiple docket numbers, but it would not be right to characterize it as successive collateral attacks.").

Id. at 1052.

Nothing in *Gasery* can be construed as suggesting that a second, untimely habeas petition may "relate back" to a prior petition in a proceeding that is no longer pending for purposes of the AEDPA's limitation period, particularly in light of the circuit court's subsequent pronouncements in *Graham*. *See Graham v. Johnson*, 168 F.3d at 780. At least six other circuit courts of appeals agree. *See, e.g., Neverson v. Bissonnette*, 261 F.3d 120, 126 (1st Cir. 2001) (relation back doctrine did not apply where the dismissal of initial habeas proceeding left "nothing to which Petition No. 2 could relate back"); *see also Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (10th Cir. 2000); *Warren v. Garvin*, 219 F.3d at 113; *Nyland v. Moore*, 216 F.3d 1264, 1266 (11th Cir. 2000); *Jones v. Morton*, 195 F.3d 153, 160-61 (3d Cir. 1999). Resolution of this conflict between the circuits is therefore necessary.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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